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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JAN 15 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Telecommunications Services )  
Inside Wiring )

Customer Premises Equipment )

In the Matter of )

Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992: )

Cable Home Wiring )

CS Docket No. 95-184

MM Docket No. 92-260

## OPPOSITION TO PETITIONS FOR RECONSIDERATION

### Introduction

The Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and the National Realty Committee (jointly, the "Real Estate Associations"), pursuant to Section 1.429(f) of the Commission's rules, hereby oppose the petitions for reconsideration of the Media Access Project and the Consumer Federation of America ("MAP/CFA"); the North Carolina Cable Television Association ("NCCTA"); and Time Warner Cable ("Time Warner"). The petitions for reconsideration are based in part on incorrect statements and assumptions about the nature of competition in the MDU video programming

024

market and the role of building owners and managers in that market. Consequently, their conclusions are flawed and must be rejected. In addition, MAP/CFA argues that the Commission should have applied Section 207 of the Telecommunications Act of 1996 and other extraneous policy considerations in this proceeding. This argument is equally flawed.

**I. IT IS THE ECONOMICS OF PROVIDING VIDEO SERVICE IN APARTMENT BUILDINGS -- NOT THE DESIRES OF BUILDING OWNERS -- THAT DEFINES COMPETITION IN THE MDU MARKET.**

The petitions for reconsideration assert that building owners act as “bottlenecks” to competition and that the only way to bring competition to the video programming market is to deny building owners the right to determine which providers may serve their buildings. Time Warner Petition at 9-11; NCCTA Petition at 5-6; MAP/CFA Petitions at 3, 7. They assert that the profit motive will cause building owners to ignore the best interests of their residents. The Commission, on the other hand, has recognized that the profit motive is actually an inducement to meeting the needs of residents, not an obstacle. *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 97-376 (released October 17, 1997) (the “Home Wiring Order”) at ¶ 61. We ourselves have made this point on a number of occasions.<sup>1</sup> We urge the Commission to stand by that conclusion, and we submit this opposition simply to assure the Commission that the basis for its original decision remains valid.

The Commission should also bear in mind that the difficulty of promoting competition in the MDU market is not the result of disincentives on the part of building owners but of disincentives on the part of programming providers. As we demonstrated in our recent Further

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<sup>1</sup> Joint Comments of the Real Estate Associations in CS Docket No. 95-184 (filed Mar. 18, 1996) at 18-26; Joint Reply Comments (filed Apr. 17, 1996) at 2-5; Further Joint Comments in CS Docket No. 95-184 and MM Docket No. 92-260 (filed Sep. 25, 1997) at 8.

Joint Comments in these dockets, filed December 23, 1997, at pp. 2-4, it is programming providers and not building owners who insist on exclusive contracts and other anticompetitive terms. The economics of installing facilities and recovering costs is such that most providers refuse to serve a building if there is another provider present. *Id.* Thus, it is not building owners that stand in the way of competition.

Similarly, the Commission should not be distracted by the fact that programming providers sometimes pay building owners for the right to serve a building. *See* NCCTA Petition at 5; Time Warner Petition at 14.<sup>2</sup> Such fees are actually not a material inducement to building owners in the vast majority of cases. In most buildings, the programming provider does not pay any fee at all, and in most of the rest the fee is relatively small, especially when compared to the owner's rental income from residents. Programming providers forget that building owners are in the business of renting apartments, and that is how they make their money.

Finally, the NCCTA petition claims that the concerns of building owners over the aesthetic effects of installing multiple video distribution systems in a building is a "canard." NCCTA petition at 5. Nothing could be further from the truth. As we have argued from the beginning, building owners have many reasons for desiring to control who enters their property and what they do there. Joint Comments in Docket No. 95-184 at 27-36. Programming providers are only concerned with reaching their customers. They are not concerned with the damage and other economic effects of their activities on the buildings they serve, but building owners are. Aesthetic factors ultimately become economic factors because they affect the

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<sup>2</sup> In an effort to sway the Commission, the Time Warner Petition mischaracterizes such payments as "kickbacks." The use of such a loaded phrase in this context strikes us as inappropriate, not to mention inaccurate. One might as well label the channel launch fees that Time Warner and other cable operators receive from programming providers as "kickbacks."

quality of life in a building. For the same reasons, safety concerns, management issues, and limiting the turnover of residents in a building are all important to building owners. The Commission has recognized the validity of all these concerns and it should take no action now based on any different conclusion.

## **II. THE COMMISSION PROPERLY DID NOT RELY ON SECTION 207 IN THIS PROCEEDING.**

The MAP/CFA Petition asserts that the Commission could and should have imported Section 207 (Restrictions on Over-the-Air Reception Devices) of the Telecommunications Act of 1996 into this proceeding. Since Congress first enacted Section 207, one party after another has seen that simple provision as the magical solution to whatever problem most irked the party in question. But Section 207 is not infinitely elastic, and the Commission has already defined its outer boundary in its *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, CS Docket No. 96-83 and IB Docket No. 95-59, 11 FCC Rcd 19276 (1996) (the “OTARD Order”).

In Section 207, Congress directed the FCC to “promulgate restrictions that impair a viewer’s ability to receive video programming services through [certain classes of] devices.” The Commission did this in the OTARD Order. For the Commission to go any further and introduce Section 207 into this proceeding would therefore exceed the Commission’s authority.<sup>3</sup> Such belated introduction would also violate the notice provision of Section 4 of the Administrative Procedure Act, now 5 U.S.C. §553.

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<sup>3</sup> See generally, Joint Comments of the Real Estate Associations in IB Docket No. 95-95 and CS Docket No. 96-83 (filed Sep. 27, 1996).

Furthermore, addressing Section 207 is unnecessary, because this proceeding was initiated expressly to deal with issues arising out of the relationships among building owners, cable operators, and other providers of video programming with respect to distribution systems within buildings. The OTARD proceeding deals with the placement of over-the-air receiving devices. Those are two separate matters, which are not necessarily connected. Consequently, the Commission has not erred by segregating the two proceedings.

### **III. THE ORDER DOES NOT FRUSTRATE CONGRESSIONAL GOALS OR IMPEDE FIRST AMENDMENT RIGHTS.**

In the Home Wiring Order, the Commission balanced a broad range of interests in an attempt to promote competition in a field that by its nature resists such attempts. As the comments of the many parties illustrate, promoting competition in one regard may restrict it in another. Furthermore, the Commission must operate within a tangled web made up of state laws, the Communications Act, and the Constitution. Favoring one group of programming providers, as MAP/CFA would have the Commission do, would only hinder competition in by not allowing the real estate industry to find a market solution to the problem. Such a solution would also run the risk of violating one or more statutory or Constitutional provisions.<sup>4</sup> Therefore, the Commission has not “frustrated” the goal of competition.

Finally, the MAP/CFA Petition overstates the role of the First Amendment and the rights of viewers in this proceeding. As we noted in the Section 207 rulemaking, the First Amendment does not require that apartment residents have the right to choose between video programming

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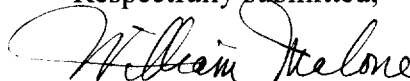
<sup>4</sup> Joint Reply Comments of the Real Estate Associations in IB Docket No. 95-95 and CS Docket No. 96-83 (filed Oct. 28, 1996) at 3-13; Joint Comments in IB Docket No. 95-59 (filed Apr. 15, 1996) at 6-11.

providers.<sup>5</sup> Similarly, there is no “statutorily guaranteed right to exercise choice among sources of video programming.” MAP/CFA Petition at 13. Nor is there any statutory provision that gives apartment residents identical rights to homeowners in the area of video programming selection. *Id.* at 14.

### **Conclusion**

For the foregoing reasons, we urge the Commission to reject the arguments raised in the petitions for reconsideration.

Respectfully submitted,



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<sup>5</sup> Joint Reply Comments of the Real Estate Associations in IB Docket No. 95-95 and CS Docket No. 96-83 (filed Oct. 28, 1996) at 13-34.

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## CERTIFICATE OF SERVICE

I, William Malone, hereby certify that on January 15, 1998, I caused copies of the foregoing Opposition to Petitions for Reconsideration Motion of the Real Estate Associations to be served by first class mail, postage prepaid, on the following:

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